IN THE

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 183.

ROBERT A. HOOE AND ARTHUR HERBERT, APPELLANTS, *vs.* THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANTS' BRIEF.

I.

Statement of the Case.

The petition is for the use and occupancy by the United States of the northwest corner of E and Eighth Streets, Northwest, City of Washington, and the amount claimed as due is $9,000. (See petition, Rec. 1-3.) The case is reported in 43 C. Cls., 225.

1. The findings of fact (Rec. 6-9) state that appellants have been and are the owners of the property above named, and that the Secretary of the Interior, under authority of the Act of June 30, 1901, entered into a written contract with the appellants, whereby

the buildings and premises described, *except the basement thereof,* were leased to the Government for the use of the Civil Service Commission, commencing August 1, 1900, and ending June 30, 1901, at the rate of $333.33⅓ per month, and the Commission took possession of the entire building, *including the basement,* and continued in exclusive possession until the bringing of the action, August 1, 1905. The amount appropriated by Congress for the rent of offices for that Commission for the fiscal year ending June 30, 1901, was $4,000, one-twelfth of which was expended as rent for the offices of the Commission for the month of July, 1900, before this tenancy began.

2. March 3, 1901, Congress appropriated $4,000 for rent for the quarters for the Commission for the fiscal year ending June 30, 1902, and the Secretary of the Interior wrote to the appellants proposing a renewal of the lease for that year, but the appellants wrote him, refusing so to do at the rate of $4,000 per annum, and stated that they could not rent the entire building, including the basement then occupied by the Commission, at less than $6,000 per annum in justice to themselves.

3. In the estimates for the appropriations for the fiscal year ending June 30, 1903, the Secretary submitted to Congress one for an increase to $6,000 for rent of quarters for the Commission, but the House did not agree, and the agent of the appellants wrote the chief clerk of the Department of the Interior that, unless that estimate of $6,000 was restored by the Senate, he was instructed by appellants to ask possession of the property at the earliest convenient time. The Senate was also informed of that con-

clusion on the part of the appellants. The agent appeared, also, before the Committee on Appropriations of the House in behalf of appellants, and stated that they would demand possession of the building unless an appropriation of $6,000 was made for the rental of the entire building. The Secretary of the Interior transmitted to the chairman of the Senate Committee on Appropriations the letter from the agent of the appellants containing the statement that the possession of the building would be demanded unless that increase was made. Congress did not increase the appropriation, but did appropriate $4,000 for rent for quarters for the Commission for the fiscal year ending June 30, 1903, the same as in the preceding years. No further action was taken by either party relative to the increase of the rent or the demanding of possession, and the Commission continued in possession of the property, including the basement, for that fiscal year.

4. In the estimates for appropriations for the fiscal year ending June 30, 1904, the Secretary of the Interior rendered his estimate of $6,000 for the rent of such quarters, and Congress increased the appropriation $500, thus making it $4,500. Following that increase in appropriation, the Secretary entered into negotiations with appellants by correspondence for the rent of all the building and premises for the use of the Commission for the $4,500 appropriated, but appellants refused to rent all the building and premises for $4,500 per annum. The Secretary finally made a lease with them, August 18, 1903, for all of the building, except the basement, for that fiscal year, at the rate of $4,500, the other provisions of the lease being like those of the lease first made.

5. May 18, 1904, Congress appropriated the sum of $4,500 for rent for the quarters of the Commission for the fiscal year ending June 30, 1905, and on November 15, 1905, the Secretary made a proposal to appellants by letter for a renewal of the lease of August 18, 1903, for the fiscal year ending June 30, 1905, at the rate of $4,500 per annum. The appellants took no action in the matter further than to ask that the basement be included at the rate of 30 cents per square foot. No lease was made for that fiscal year, but the appellants were paid rent for that year at the rate of $4,500.

6. The appropriation for the rent of quarters for the Commission for the fiscal year ending June 30, 1906, was also in the sum of $4,500, and the Commission, without any express renewal of the lease for that fiscal year, continued in occupation of the entire building, including the basement, up to August, 1905, the date of the filing of the petition in this case, and paid the appellants rent at the rate of $4,500 per year.

7. The basement was used by the Civil Service Commission during the entire period of occupancy above described, without a lease therefor, the Commission having taken possession of the basement August 1, 1900, and having continued in the occupancy and use thereof until this action was brought, all with the knowledge of the Secretary of the Interior. The fair rental value of that portion of the basement occupied and used by the Commission was $400 per year, and the rental value of the entire building, including the basement, was not less than $6,000 per year.

8. During the time the Commission occupied and used the premises the appellants receipted for rent for the same in full, *except for the basement,* which was especially excluded from each of the receipts given by them, and with the exception of the exclusion of the basement from the receipts, it does not appear that any other protest was ever made by the appellants that the payments were not in full for the rent legally due to them for the building. Appellants have repeatedly insisted that the defendants were not paying enough rent for the building, and on one occasion asked for extra rent for the basement.

On the findings of fact the court below dismissed the petition and entered judgment for the United States.

II.

Assignments of Error.

1. The court below erred in dismissing the petition and rendering judgment in favor of the defendant.

2. And in not giving effect to that provision of the fifth amendment to the Constitution of the United States, to the effect that private property shall not be taken for public use without just compensation, and in holding that the officers of the United States had no authority or power to take possession of appellants' property and occupy it for public purposes, and thus obligate the United States to make just compensation for such use and occupancy.

3. The court below erred in not rendering judgment in favor of appellants for the value of the use of the basement for five years, in the sum of $2,000.

4. The court below erred in not rendering judg-

ment in favor of appellants for the balance due for the value of the use of the building during the non-lease periods, in the sum of $4,391.66.

5. And in not rendering judgment in favor of appellants for the sum of $6,391.66, which is the sum total of the two amounts above named.

6. And in not rendering judgment for appellants in the sum of $8,958.33, that being the balance of the rental value of the premises occupied.

III.

Synopsis of Argument.

1. The periods of occupancy.
2. Authority to take and occupy under the right of eminent domain.
3. Legislative authority to take and occupy under Act of January 16, 1883.
4. Consideration of the views of the court below as to the language of general appropriation acts.
5. And of certain other acts relating to the making of express contracts.
6. The Act of January 16, 1883, is a special or particular act, and thus is an exception to general acts or provisions.
7. Effect of occupancy whether with or without lease.
8. Obligation to make compensation is constitutional and does not depend on contract made by an official.
9. Secretary of Interior had no power to make an implied contract with owners of this property.
10. A consideration of the nature of the obligations in this case.

11. Objections made by claimants to the acts of the officials.
12. Receipts given by claimants as payments were made.
13. Amount of compensation due to claimants.

IV.

ARGUMENT.

I.

Periods of Occupancy.

1. The first lease period for the building, exclusive of the basement, was from August 1, 1900, to June 30, 1901—eleven months—at the rate of $4,000 per annum.

The second lease period for the building, exclusive of the basement, was from July 1, 1903, to June 30, 1904—one year—at the rate of $4,500 per annum.

The total lease period was one year and eleven months.

2. There was no lease for the building from July 1, 1901, to June 30, 1903—two years—nor from June 30, 1904, to August 1, 1905—one year and one month—a total of three years and one month.

3. The Government occupied the basement all the time—five years—without a lease.

II.

Authority to Occupy Under Right of Eminent Domain.

The first question that naturally arises is as to the authority of some Government official to take posses-

sion of the property, use and occupy it, either under a formal written contract or without any contract.

The right of eminent domain is the offspring of political necessity; it is inseparable from sovereignty unless denied to it by its fundamental law; it reaches back of all constitutional provisions; and it is not necessary here to do more than rely on the fifth amendment of the Constitution, for that amendment not only recognizes the existence of the power, but it states the exact limitation upon its exercise.

The Government of the United States has the absolute power to take private property for public use, just compensation being made. This rule is established by the cases cited hereafter, and it is so well settled as to call for nothing more than its bare statement here.

The Secretary of the Interior and the Civil Service Commissioners were and are officers of the United States charged with the performance of official duties. The United States acted by and through them. The Secretary of the Interior, in order that the Commission might have offices and other requisites for the performance of official duties, occupied this property, through the Commission, for public uses and purposes. In doing that he represented the supreme power of the United States, and his official acts cast upon the Government the constitutional obligation to make just compensation for the use of the property. The actions of the Secretary are not to be regarded as his personal acts but as the acts of the Government. All that he did was by virtue of his position as an officer of the Government, and if there be no specific act of Congress directing him in

the matter, yet if that which he did officially, and which the Government got the benefit of, resulted in the appropriation of the use of this property by the Government, it is to be treated as the act of the latter.

United States v. *Lynah*, 188 U. S., 465, 466 and cases cited.

Besides that, the House and Senate were fully informed as to what the Secretary of the Interior and the Commission had done. (Rec. 7, 8.)

III.

Legislative Authority to Take and Occupy Under Act of January 16, 1883.

There is ample legislative authority for all that was done in this case.

The Act of January 16, 1883, created the Civil Service Commission. (22 Stat., 403; 1 Fed. Stat., Ann., 809.) The fourth section of that statute is as follows:

> That it shall be the duty of the Secretary of the Interior to cause suitable and convenient rooms and accommodations to be assigned or provided, and to be furnished, heated and lighted, at the City of Washington, for carrying on the work of said Commission and said examinations, and to cause the necessary stationery and other articles to be supplied, and the necessary printing to be done for said Commission.

It is plain that this section made it the duty of the Secretary to provide suitable and convenient rooms

and accommodations for the Commission in the City of Washington, furnish, heat and light them, and procure necessary stationery, other articles, and printing for the Commission. It would be difficult to conceive broader powers in this respect than those granted by this section. The Secretary was made a part of the official life and conduct of the Commission.

The statutory authority is broad, comprehensive, and without condition or limitation. Everything suitable and convenient in the way of rooms and accommodations was to be assigned or provided. Nothing less than a repeal, amendment or modification of this statute could destroy, limit or lessen the power granted by it, and there has been nothing of the kind. That act has stood, word for word and without change, since January 16, 1883.

While it is true that this authority runs to the Secretary of the Interior by designation, yet it does not follow that he alone had the right to deal with the subjects covered by the statute. He could well speak and act through his subordinates or through the officials of the Commission. This principle is firmly settled.

> *Parish* v. *United States*, 100 U. S., 504;
> *McElrath* v. *United States*, 102 U. S., 436;
> *McCollum's case*, 17 C. Cls., 101, 102.

The United States, by its agents, proceeding under the authority of an Act of Congress, took appellants' property for public uses, and it thereby became obligated, by virtue of the Constitution, to make just compensation, and this action lies for the value of the use and occupancy of their property.

United States v. *Great Falls Mfg. Co.*, 112 U. S., 645, 656, 657;
Great Falls Mfg. Co. v. *United States*, 124 U. S., 581, 597;
Monongahela Nav. Co. v. *United States*, 148 U. S., 312, 324-326;
United States v. *Lynah*, 188 U. S., 445, 460-470.

There is nothing in the record to show, and it cannot be presumed, that the Secretary of the Interior took, or allowed the Commission to take, possession of more property, in the way of "rooms and accommodations," than was "suitable and convenient" for "carrying on the work of said Commission," and, as was said in *Great Falls Mfs. Co.* v. *United States*, 124 U. S., 581, 597, "consequently, the Government is under a constitutional obligation to make compensation for any property or property right taken, used, and held by him for the purposes indicated in the Act of Congress," . . .

In that case, as in the case at bar, the lands taken had "substantial connection" with the objects and purposes of the work undertaken by the Government, and no assault was made on the motives or conduct of the Secretary.

In the case last cited, as in the case at bar, there was no statutory direction to take the particular property, but, as was said in *United States* v. *Lynah*, 188 U. S., on p. 467, there was "a direction to do that which resulted in a taking, and it was held that the owner might waive the right to insist on condemnation proceedings and sue to recover the value." See, also, pp. 460-465.

Therefore we conclude that the taking of the property here was authorized by the sovereign power inherent in the United States, by the language of the fifth amendment, and by the Act of January 16, 1883, heretofore quoted, and that everything done by the Secretary was for the use and benefit of the United States, and resulted in its enjoyment and occupancy of the property belonging to the appellants.

The Court of Claims found that the value of the use of the property, including the basement, was at least $6,000 per year, and that for the first three years of its occupancy the United States paid appellants $4,000 per annum, and for each of the remaining two years $4,500 per annum, exclusive of the basement. Just compensation has not been made.

IV.

Consideration of the Views of the Court Below as to the Language of the General Appropriation Acts.

The opinion of court below (Rec. 12) masses the statutes that the court thought stood in the way of a recovery by the appellants. The court said:

> The several appropriation acts of Congress making provisions for the rent for quarters for the Civil Service Commission for the several years while the building of the claimants was so occupied, leaving out everything except the specific appropriation, were as follows:
>
> "That the following sums be, and the same are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, in full compensation for the service of the fiscal

year * * * for the objects hereinafter expressly named: * * * For rent * * * Civil Service Commission, four thousand dollars."

The laws then in force relating to this subject were as follows:

"SEC. 3679. No Department of the Government shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract for the future payment of money in excess of such appropriations.

"SEC. 3732. No contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year."

Act of June 22, 1874 (18 Stat. L., 144):

"And hereafter no contract shall be made for the rent of any building or part of any building in Washington, not now in use by the Government, to be used for the purposes of the Government until an appropriation therefor shall be made in terms by Congress."

Act of March 3, 1877 (19 Stat. L., 370):

"And hereafter no contract shall be made for the rent of any building, or part of any building, to be used for the purpose of the Government in the District of Columbia, until an appropriation therefor shall have been made in terms by Congress, and that this clause be regarded as notice to all contractors or lessors of any such building or part of building."

We do not know how long such language as that first above quoted has been used in our appropriation acts, but we have found it as far back as the Act of August 5, 1882, 22 Stat., 219, five months before the Civil Service Commission was created by law.

Sec. 3679 R. S. goes back to July 12, 1870, 16 Stat., 251, and Sec. 3732 to March 2, 1861, 12 Stat., 220, while the remaining acts quoted by the court are dated June 22, 1874, and March 3, 1877. All of these statutes were passed before the Commission was created by the Act of January 16, 1883.

Since these dates this court and the Court of Claims have adjudicated many cases growing out of Departmental transactions in the way of taking property, and have found nothing in the language of the acts quoted to bar a recovery on the part of the owners. It is scarcely possible that the existence of these statutory provisions has escaped the vigilant eyes of counsel and the careful scrutiny of the courts in the past. It would seem, therefore, that we need not pay further attention to them now, but we will make these observations:

1. The language first quoted from the appropriation acts has not barred recovery in a solitary case, nor should it do so, for the reason that no Act of Congress can defeat or nullify the obligation contained in the fifth amendment. The latter must prevail. An appropriation act fixes the amount to be paid by the Government in a certain fiscal year, but it does not strike to earth a constitutional obligation by failing to provide enough money to discharge that obligation.

Shipman's case, 18 C. Cls., 138, 147;
Graham's case, 1 C. Cls., 381;
Collins' case, 15 C. Cls., 22, 35;
Briggs' case, 15 C. Cls., 48;
Parsons' case, 15 C. Cls., 246.

2. When an act authorizes the officer to do a particular thing without restriction as to cost, and an inadequate appropriation is made, and the same thing done inures to the benefit of the Government, or is accepted by the proper public officers, an action will lie for the reasonable value thereof.

Shipman's case, 18 C. Cls., 138, 146, 147;
Freedman's Bank case, 16 C. Cls., 19, 29.

V.

Consideration of the Views of the Court Below as to Certain Acts Relative to the Making of Express Contracts.

The remaining statutes quoted by the court below clearly relate to express contracts, prohibit the making of *express contracts only,* apply to officials and not to citizens, and do not apply to those cases or legal rights which arise from the acts of public officers with reference to property in carrying on the business of the Government entrusted to them.

N. Y. C. & H. R. R. R. case, 21 C. Cls., 468, 472, 473;
Semmes & Barber case, 26 C. Cls., 129, 130;
Rives' case, 28 C. Cls., 249, 252;
Smoot's case, 38 C. Cls., 418, 427.

We submit that the language of those statutes is not susceptible of any other interpretation; that they do not stand in the way of a recovery here; and that no legislative enactment can minimize the force of the fifth amendment or defeat its operation.

VI.

Act of January 16, 1883, is a Special or Particular Act, and is an Exception to General Acts.

Another consideration of controlling force here, as we think, lies in the fact that the Act of January 16, 1883, is a special act, dealing with a special subject and conferring special powers on the Secretary of the Interior. It therefore falls under the well-settled rule that a special act must be taken as intended to constitute an exception to general acts or provisions, and the presumption is that the special act is to be considered as remaining an exception to them.

> *Rodgers* v. *United States,* 185 U. S., 83, 87-89; *Ex parte Crow Dog,* 109 U. S., 556, 570.

This being a special or particular act, the things done under it are not subject to the provisions or the prohibitions of any general acts.

The rule above stated was applied in *N. Y. C. & H. R. R. R. case,* 21 C. Cls., 468-472, in which it was held that an act appropriating money to be expended by the Postmaster-General in obtaining proper facilities for the railway mail service was a special or particular act, to which sections 3679 and 3732, R. S., must yield.

The rule was applied in—

McCullom's case, 17 C. Cls., 92;
Shipman's case, 18 C. Cls., 147;
Dougherty's case, 18 C. Cls., 503;
Beaman's case, 19 C. Cls., 9.

It follows that the statutes relied on by the court below are inapplicable here.

VII.

Effect of Occupancy Whether With or Without Lease.

For the sake of convenience we will again state the periods and kinds of occupancy.

1. The first lease period for the building, exclusive of the basement, was from August 1, 1900, to June 30, 1901—eleven months—at the rate of $4,000 per annum.

The second lease period for the building, exclusive of the basement, was from July 1, 1903, to June 30, 1904—one year—at the rate of $4,500 per annum.

The lease periods amounted to one year and eleven months.

2. There was no lease for the building from July 1, 1901, to June 30, 1903—two years—or from June 30, 1904, to August 1, 1905—one year and one month—a total of three years and one month without lease.

3. The Government occupied the basement all the time—five years—without a lease.

The Secretary entered into two leases in writing, as above stated, and caused or permitted the building to be occupied for the remainder of the holding periods without a lease in writing; and, during all

of the period of occupancy covered by this action, he caused or permitted the basement to be used and occupied by the Government without a lease in writing. For the period of three years and one month the building above the basement was occupied by the Government without lease, and the basement was thus occupied for the whole five-year period without lease.

The court below held that, during the non-lease period, the Government "was as a tenant holding over after the expiration of the former written lease." (Rec. 11.)

That is a familiar rule of the law of landlord and tenant as between private persons, but we think it does not apply to this particular case, and for the following reasons:

1. Where there is no *express contract* for the use of property in present occupation by the Government, the obligation to make just compensation is fixed by the fifth amendment, and it attaches *eo instanti.*

The question arose squarely in the *Semmes & Barbour case,* 26 C. Cls., 119, decided January 12, 1891. That was an action to recover for the use of certain premises in the City of Washington that had been occupied by the Government as a city post-office. The Government made a lease with the claimants for the basement, first and second stories of the Seaton House, dated September 25, 1879, for five years from the date the premises should be occupied by the United States, which occupancy began on the 15th day of November, 1879, thus making the lease period end November 15, 1884. The agreed rental

was at the rate of $5,000 per annum, payable quarterly, and it was paid up to November 15, 1884. After the expiration of the lease the value of the rent of that portion of the premises covered by it was more than $5,000 per annum. The Government continued to hold the leased portion of the premises, and certain rooms which it had taken possession of in the third story, paying the owners of the building for such occupancy of the leased premises at the rate of $5,000 per annum, although the true value of the use of the occupied portion, after the expiration of the lease, was $8,000 per annum.

As we have stated, the lease expired November 15, 1884. The owners of the building, November 30, 1886, gave written notice to the Government (p. 123) that after December 31, 1886, the rent of the property then occupied would be $8,000 per annum; that they were unwilling to rent it for less than that amount; they demanded that the premises be vacated by December 31, 1886, unless the Government would pay at the rate of $8,000; and they relinquished any right to a higher rental prior to the date last named. The Government refused to surrender the premises, and continued to hold and use them, but failed to pay more than $5,000 therefor.

The controversy related to the rental value of the basement, and first and second stories, from January 1, 1887, to June 30, 1888, $12,000, on account of which $7,500 had been paid, and the value of the use of the rooms on the third floor of the building from January 1, 1883, to June 30, 1888. (See last paragraph of the opinion.) The opinion of the Court of Claims was written by Judge Weldon, who first made

a clear summary of the findings (pp. 128, 129), held that the Postmaster-General had the power to make the lease, and said, on page 131:

> Since the first day of January, 1887 (that being the time from which the claimants date their right of recovery), the defendants have held the leased property against the demand of the claimants, without any express contract as to tenure or compensation. The Postmaster-General has not violated any statute, because he has not attempted, since the execution of the contract made in September, 1879, to lease any [of] the premises for the use of and occupation of the Department. We do not hold that the failure to vacate the premises as demanded in the communication of November 30, 1886, created an express contract and subjected the defendants to the payment of the sum of $8,000 from the first of January, 1887; but we find that the rental value of the premises, from that time until the 30th of June, 1888, was worth at the rate of $8,000 per annum.

The court rendered judgment for the claimants in the sum of $6,012. The case was not appealed and the judgment was paid.

That case is in point here, we think. There the lease expired by virtue of its own terms on the 15th day of November, 1884. Here the first lease expired June 30, 1901, and the next one expired June 30, 1904. In other words, the leases became *functus officio* at the end of their respective fiscal years. The Court of Claims, in the *Semmes and Barbour case*, did not understand the rule to be as stated by that court in the case at bar, viz: that the Government was a ten-

ant holding over after the expiration of the former lease, and was liable only to the extent of the covenants in such former lease, thus extending the operation of that lease and giving it new life. The court, in the former case, plainly proceeded on the theory that the obligation was because of the continued occupancy of the premises after the expiration of the written lease, taking effect from the date named in the notice, lasting during the period of that occupation thereafter, and it was by virtue of that obligation that the judgment was rendered. The court, in the quotation above made, expressly repudiated the theory that the notice created an express contract, as it would have done when followed by occupancy in the case of individual parties, but put the right of recovery on the ground of just compensation, thus making the right rest on the Constitution.

The *Semmes and Barbour case* is very much like the case at bar in other respects. There, as here, the Government occupied a portion of the premises beyond those described in the written lease; there, as here, the Government paid to the owners much less than the real value of the use of the premises it occupied; there, as here, the owners tried to better their condition by giving the Government to understand that the possession of the premises was expected unless it paid a higher figure, but no attempt was made to dispossess; there, as here, the owners gave receipts for the money received by them. While it is not stated in the findings or in the opinion in that case that such receipts were executed by the owners, yet it must be apparent to those having knowledge of governmental methods of disbursement that receipts were taken from them.

VIII.

Obligation to Make Compensation is Constitutional and Does not Depend on a Contract Made by an Officer.

The obligation to make compensation is constitutional and does not depend in any degree upon the making of a contract, either express or implied, by a Government official. The Government is under a constitutional obligation to make compensation for any property or property right taken, used and held for lawful Government purposes.

United States v. *Great Falls Mfg. Co.*, 112 U. S., 645, 656;
Great Falls Mfg. Co. v. *Atty.-Gen.*, 124 U. S., 581, 597;
United States v. *Russell*, 13 Wall., 623, 627-630.

As was said by this court in *Bauman* v. *Ross.*, 167 U. S., 548, 574:

> The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.

To award the appellants the value of what they have been deprived of would be to require the court below to render judgment on the basis of $6,000 per annum, that being the amount found by that court

to be the actual value of the use and occupation of the premises; to award them less than that would be unjust to them and would not comply with the requirement of the Constitution. In no other way can they receive "the just compensation required by the Constitution to be made to the owner," for that compensation "is to be measured by the loss caused to him by the appropriation." That compensation is not to be measured in cases of this character by the action of a Government official, nor by legislative enactment. Congress cannot fix such compensation, for the question of the amount or measure of the compensation is judicial, and not legislative.

Monongahela Nav. Co. v. *United States*, 148 U. S., 327.

It follows that the combined action of Congress and of the administrative officer cannot fix the measure of the compensation. The obligation is constitutional, and the fixing of the measure of the compensation is judicial, where the owner on the one hand and the Government official on the other have not reached a valid agreement as to the amount. The court below, however, dealt with this question upon an entirely different basis, and thus it erred.

IX.

Secretary of Interior had no Power to Make an Implied Contract with Owners of this Property.

Again, it was out of the power of the Secretary of the Interior to make an "implied contract" with the

owners of this property, for he was forbidden by Section 3744 to do anything of that kind. That section requires the Secretary of War, the Secretary of the Navy and the Secretary of the Interior to "cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; . . ." It then requires a copy of each contract so made to be filed in the Department of the Interior, etc. This section prohibits the Secretary of the Interior from making a contract in any other manner, for it is mandatory and imperative in its requirements. That section was considered by this court in *Clark* v. *United States,* 95 U. S., 539, 541, 542, where it was said:

> It makes it unlawful for contracting parties to make contracts in any other way than by writing signed by the parties. This is equivalent to prohibiting any other mode of making contracts.

That case was followed and approved in *South Boston Iron Co.* v. *United States,* 118 U. S., 37, 42.

We think it plain that the legislative determination has been clearly expressed that the Secretary of the Interior shall not make any contract that may be obligatory upon the United States but in the manner prescribed by this section. An "implied contract," therefore, such as the Court of Claims has endeavored to establish, was beyond the power of the Secretary to make in a case of this character.

X.

A Consideration of the Nature of the Obligations in This Case.

It follows that we are standing here on two written leases for a total of one year and eleven months, and on the constitutional obligation for three years and one month; and we submit that the obligation of the Constitution does not depend upon any form or character of implication. That obligation is plain and positive, and is not one of inference or implication.

The existence of a constitutional obligation is recognized by the Act of March 3, 1887 (24 Stat., 505), commonly known as the Tucker Act. The first paragraph confers jurisdiction on the Court of Claims to hear and determine "all claims founded upon the Constitution of the United States." Prior to that time that court did not have jurisdiction of claims that were founded on constitutional obligations or provisions. Section 1059, R. S., gave the Court of Claims jurisdiction of "all claims founded upon any law of Congress," but it did not embrace claims that were founded on the Constitution. That failure to cover claims that were bottomed on constitutional provisions resulted in so many acts of injustice, or failures of justice, that Congress was induced to pass the Tucker Act. The history of the litigation that produced this legislation is well stated by Judge Nott in *Stovall, Admr.*, v. *United States*, 26 C. Cls., 226, 237-240, in which it is held that the Tucker Act extended the jurisdiction of the court to constitutional obligations for the occupation or use of real property, and "irrespective of the technical rules and re-

finements of the common law, or of the ambiguities and uncertainties of statutory provisions and definitions."

Prior to the Tucker Act the Court of Claims sometimes had to resort to the fiction of "an implied contract" in order to maintain jurisdiction. Since the passage of that act cases of this character have had just recognition as being constitutional in their origin, "founded upon the Constitution." In *Dooley* v. *United States,* 182 U. S., 222-224, this court divided the cases covered by the first section of that act into "four distinct classes of cases," the first being "those founded upon the Constitution or any law of Congress," and the third being "cases of contract, expressed or implied, with the Government."

By that act the Congress gave legislative recognition to cases of this character, and conferred jurisdiction on the Court of Claims to hear and determine them. Therefore we are not obliged, in the case at bar, to show an "implied contract" for the non-lease period covered by this occupancy, and it is enough for us to establish that occupancy, with the concurrent recognition by the Government of title in the appellants, and prove the value of the use of the property.

The words "implied contract," which may have become venerable by long usage, are really inexact. The law does not "imply a contract." What the law actually does is to empower the court to infer a contract from a given state of facts or conditions. The court infers the contract to be one which the defendant should have made in justice and right. *Ingram's case,* 32 C. Cls., 147, 148, 164, 165, in which Chief Justice Nott wrote a learned opinion.

Blackstone says (3 Com. side, p. 158) that contracts implied by law "are such as reason and justice dictate, and which therefore the law presumes that every man has contracted to perform, and upon this presumption makes him answerable to such persons as suffer by his non-performance."

Why should the court or the law be expected to infer or presume a contract, or why should it actually do so, when the obligation is made by the Constitution? An obligation created by the Constitution is beyond the realm of inference or implication—*it is an existing legal entity.* If not, why should Congress have recognized that form of obligation and have conferred jurisdiction of it upon the Court of Claims by express language? Could not the court infer or "imply" a contract from an Act of Congress with equal readiness and certainty? Yet Congress early conferred express jurisdiction on the Court of Claims to hear and determine cases "founded upon any law of Congress." Sec. 1059. The Court of Claims has had jurisdiction, ever since its organization as a court, of cases founded upon contracts "expressed or implied." If the court could have inferred or implied a contract from any law of Congress, why should that express grant of jurisdiction have been made?

Judicial decisions prove that something more than Section 1059 was needed to confer jurisdiction where constitutional obligations were involved, and therefore the Tucker Act made use of the words, "founded upon the Constitution." The Constitution and the Tucker Act, either singly or in union, take this case beyond the realm of "implied" or "inferred con-

tracts," and make it stand entirely as one of plain and simple constitutional obligation.

XI.

The Objections Made by the Claimants to the Acts of the Officials.

1. In Finding III it is stated that Congress, May 3, 1901, appropriated $4,000 for rent of quarters for the Commission for the next fiscal year, and shortly after the beginning of that fiscal year the Secretary of the Interior wrote appellants, proposing a renewal of the lease for that year, in response to which the appellants wrote the Secretary that they were unwilling to bind themselves to rent the building for another year at the rate of $4,000 per annum, and stated that they could not with justice to themselves rent the entire building, including the basement, then occupied by the Commission, at less than $6,000 per annum. No further action was taken for that fiscal year, and the Government continued in possession of the building and basement and paid appellants $4,000.

2. In his estimates for appropriations for the fiscal year ending June 30, 1903, the Secretary submitted to Congress an estimate for an increase to $6,000 for rent of quarters for the Commission, but as that sum was not included in the bill for that fiscal year, as passed by the House, the agents of the appellants wrote the chief clerk of the Department of the Interior that, unless that estimate of $6,000 was restored by the Senate, he was instructed by appellants to ask possession of the property. The Senate

was also informed of that conclusion of the appellants. That agent also appeared before the Committee on Appropriations of the House of Representatives in behalf of appellants, and stated that the appellants would demand possession of the building unless $6,000 was appropriated for rental, and the Secretary of the Interior transmitted to the chairman of the Senate Committee on Appropriations the letter from the agent of the appellants above mentioned. Congress did not increase the appropriation for the fiscal year ending June 30th, but appropriated $4,000 instead, and that amount was paid for that year.

3. In Finding IV it is stated that in the estimates for appropriations for the fiscal year ending June 30, 1904, the Secretary of the Interior renewed his estimate for an increase of $2,000 for rent of quarters for the Commission, and Congress appropriated $4,500. The Secretary then entered into negotiations with appellants by correspondence for the rent of all the building and premises for $4,500, but appellants refused, and he finally made a lease with them, August 18, 1903, for all the building except the basement, for that fiscal year at the rate of $4,500.

4. May 18, 1904, Congress appropriated $4,500 for rent of quarters for the Commission for the next fiscal year, and November 15, 1904, the Secretary made a proposal by letter to the appellants for a renewal of the lease of August 18, 1903, for the fiscal year ending June 30, 1905, at the rate of $4,500 per annum. Appellants took no action in response to that proposal, further than to write the Secretary of the Interior, requesting that the basement of the

building, which had not been included in either of the leases, be included at the rate of 30 cents per foot for its floor space. No further action was taken by either party with reference to the renewal of the lease or increase of rental for that fiscal year, and the appellants were paid rent at the rate of $4,500.

5. In Finding VI it is stated that with the exception of excluding the basement from the receipts given by the appellants, it does not appear that any other protest was ever made by the appellants that the payments were not in full for the rent legally due to them for the building. "The claimants, however, repeatedly insisted that the defendants were not paying enough rent for said building, and on one occasion asked for extra rent for said basement, as heretofore found."

It is perfectly plain from these findings that appellants repeatedly and consistently objected to the use and occupation of the entire property by the Government for less than $6,000 per annum, and the Secretary of the Interior recognized the justice of their position. They asserted their claims and rights at every opportunity and within the rules of law, not only to the Secretary of the Interior, but to both branches of Congress. The Government officials were fully advised all the time concerning the views, claims, demands and assertions of right on the part of the appellants, and the Government had full notice and knowledge thereof. These things were not done in a bushel. Not for one moment did appellants concede the right of the Government to use and occupy the entire property at a rental or valuation of less than $6,000 per annum, and their

behavior was such that the Government was not misled for one moment.

Appellants' conduct was of such a character as to give the Government ample warning, both in the Department and in Congress, and to put and keep it on its guard and at the same time preserve to the appellants their right to demand the amount due for the use and occupation of the whole property. Their conduct is inconsistent with any other view or theory.

Everything that was said and done in the way of objection or complaint was for the purpose of showing that while appellants were willing that the Government should occupy their property, they were not willing that it should be done without just and adequate compensation. It is true that they did not resort to an action in ejectment for the recovery of the possession of their property, but it is equally true that they were well within their legal rights when they allowed the Government to remain in possession of the real estate and take what the Government paid them, but always complaining against the amount paid or proposed to be paid, and objecting that they were not receiving from the Government just and reasonable compensation. Thus, while on the one hand they were consenting that the Government might occupy, they were also reserving to themselves the right to insist upon adequate, just and reasonable compensation.

The circumstances of the whole transaction, from beginning to end, the complaints and objections made by the appellants, directly or indirectly, covering a period of several years, surrounded and became part and parcel of the occupancy during that period, as

well as of everything connected with it. The Government was not misled, for it had fair warning during the entire non-lease period. No interest of the Government has suffered by reason of the conduct of the appellants. No rights have become vested upon the faith of their acts in the premises, and no wrong can be done by the judicial investigation and determination of the issues presented by this record. On the contrary, and as the Court of Claims has found that during the entire period of occupancy the actual rental value of the whole property was not less than $6,000 per annum, if there should not be that judicial investigation and determination of the issues, there would be a palpable wrong done to appellants.

XII.

Receipts Given by Claimants as Payments were Made.

In Finding VI the court states that the Government occupied and used the building and basement and the appellants receipted "for rent for the same in full, except for the basement, which has been specially excluded from each of said receipts given by the claimants. With the exception of this exclusion of the basement from said receipts, it does not appear that any other protest was ever made by the claimants that said payments were not in full for the rent legally due to them for said building."

This finding will have to be taken in connection with the other findings relative to complaints and objections made by the appellants during the entire non-lease period.

The court below did not set forth the forms of any of the receipts given, although all were made part of the record and were discussed in the briefs on the trial. We cite pages 81 to 85 of that trial record. The first receipt is as follows:

> Appropriation for rent of building, Department Interior, 1900:
> The United States, Department of the Interior, to Hooe & Herbert, Dr.
> Augst. 31, 1900. To rent of building above basement, NW. corner of 8th and E streets, for use of the Civil Service Commission for the month of Augst., 1900, $333.33
> Received at Washington, D. C., Augst. 31, 1900, of Geo. W. Evans, disbursing clerk, Department of the Interior, three hundred & thirty-three & 33/100 dollars in full of the above account.
> (In duplicate.)
>
> Hooe & Herbert,
> By A. Herbert.

That was followed by monthly receipts to and including June 30, 1901, the end of that fiscal year. Each of those monthly receipts, with the exception of the dates, is exactly like the first one, above copied.

After the end of that fiscal year the payments were made annually, the first annual payment being June 30, 1902, and that receipt is as follows:

> Appropriation for rent of building, Department Interior, 1902.
> The United States, Department of the Interior, to Hooe & Herbert, Dr.
> June 30, 1902. To rent of building (above basement) NW. corner of 8th and E street,

for use of Civil Service Commission for the year ending June 30th, 1902, $4,000

Received at Washington, D. C., June 30, 1902, of Geo. W. Evans, disbursing clerk, Department of the Interior, four thousand dollars in full of the above account.

(In duplicate.)

Hooe & Herbert,
By A. Herbert.

The following year, and on the 30th day of June, 1903, exactly the same receipt was executed, with the exception of the date.

The appropriation was then raised to $4,500, as we have seen, and June 30, 1904, the following receipt was executed:

Appropriation for rent of building, Depart. Interior, 1904.

The United States, Department of the Interior, to Hooe & Herbert, Dr.

June 30, 1904. To rent of building (above & exclusive of basement) NW. corner of 8th and E strs. for use of the Civil Service Commission for the year ending June 30th, 1904, $4,500.00

Received at Washington, D. C., June 30th, 1904, of Geo. W. Evans, disbursing clerk, Department of the Interior, forty-five hundred dollars in full of the above account.

(In duplicate.)

Hooe & Herbert,
By A. Herbert.

Similar receipts were executed June 30, 1905, and June 30, 1906, with the exception of the dates.

We have no doubt counsel for the Government will admit the accuracy of what has been said about those

receipts, and that we have copied them correctly from the record below.

It will be seen that these monthly receipts began, first, with a statement for the "rent of building above basement," and next that the annual receipts are for the "rent of building above basement" . . . "for one year to June 30." Following the statement of the account is the usual acknowledgment of receipt "in full of the above account." *That language is found in each and every receipt.*

It will be noticed, also, that the first receipt began as follows: "Appropriation for rent of building, Department of Interior, 1900," and that each of the other receipts began in the same way, with the exception of a change of year.

1. We think it is clear that these receipts dealt only with the appropriations, and that none of them did anything more than acknowledge payment "in full of the above account."

In *Fire Ins. Ass.* v. *Wickham,* 141 U. S., 564, 577, this court, through Mr. Justice Brown, said:

> The rule is well established that where the facts show clearly a certain sum to be due from one person to another, a release of the entire sum upon payment of a part is without consideration, and the creditor may still sue and recover the residue. If there be a *bona fide* dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim, but where the larger sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole

> upon payment of part will not be considered as a compromise, but will be treated as without consideration and void.

That rule was approved in *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Clark,* 178 U. S., 353, 366, 367, and *City of San Juan* v. *St. John's Gas Co.,* 195 U. S., 510, 522.

We submit that the facts found show clearly that the value of the use of the entire property during the non-lease period was at least $6,000 per annum, and that the appellants received $4,000 per annum for a time and $4,500 per annum for the remainder of the period. There was, then, according to the facts existing during that period, and as established by the findings of the court, at least $6,000 due to the appellants, in justice and common right, during the period of occupancy, and according to the constitutional obligation that amount should have been paid to them. It follows that, even if there had been a release of the entire sum upon payment of a part of the amount due, such release would have been without consideration and the appellants could still sue and recover the residue.

2. Again, we submit that there was no dispute as to the amount due. The facts do not show that there was any controversy at all on that subject, and therefore there was no such dispute as could be a subject of compromise and payment of a certain sum as a satisfaction of the entire claim. The larger sum of $6,000 is admitted to be due in justice and in common right, and has never been disputed. The circumstances of the case, as established by the findings, show that there was no good reason to doubt that the

larger sum was due, and therefore the release of the whole upon payment of a part should not be considered as a compromise, but should be treated as without consideration and void.

So, applying the facts found in this case to the rule established by the repeated decisions of this court, and considering the narrow and restricted language and nature of the receipts, it must be held, as we think, that they do not stand in the way of a recovery by the appellants.

Amount of Compensation Due.

If there had been no leases executed during the period covered by the petition, it seems that the amount due would be as follows:

Rent of premises from August 1, 1900, to August 1, 1905, at $6,000 per annum	$30,000.00
Less amount actually received for that period	21,041.67
A difference of	$8,958.33

But a lease was made for the building, exclusive of the basement, from August 1, 1900, to June 30, 1901, eleven months, at $4,000 per annum, and another lease was made for the building, exclusive of the basement, from July 1, 1903, to June 30, 1904, one year, at $4,500. In view of the fact that the appellants executed those leases for the building, exclusive of the basement, and received the amounts named in the leases, it may seem that they are not entitled to recover anything additional in the way

of compensation for the use of the building during those leased periods.

We are clear, however, and we respectfully submit, that appellants are entitled to recover compensation for the use of the basement during the entire period of five years, because it was excluded from the leases and from the receipts, and to recover, also, for the use of the building during the non-lease periods, over and above what they received, and up to $6,000 per annum.

1. The court below found the annual rental value of the whole property to be	$6,000.00
And the annual rental value of the basement	400.00
That leaves the annual rental value of the building	$5,600.00
2. This puts the account in detail thus:	
Rental value of basement for five years	$2,000.00
No lease for building from July 1, 1901, to June 30, 1903, two years. The rental value of the building during that time was $11,200, and appellants received $8,000, a difference of	3,200.00
No lease of building from June 30, 1904, to August 1, 1905, one year and one month. The rental value of the building during that time was $6,066.66, and appellants received $4,875, a difference of	1,191.66
Total due	$6,391.66

We submit that this court, if it should reach the conclusion that appellants are not entitled to $8,958.33, as the total amount of just compensation, should direct the court below to render a judgment for $6,391.66; and that even if the view of the court below should be adopted that the appellants are not entitled to recover the remainder of the value of the use of the building during any of the periods, still this court should direct the Court of Claims to render a judgment for appellants in the sum of $2,000, that being the rental value of the basement for five years, as stated in the findings.

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